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Supreme Court, U.S.
FILED
AUG 17 1995
OFFICE OF THE CLERK

No. 95-116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DONNA WINTERS, an individual person,

Petitioner,

v.

COSTCO WHOLESALE GROUP BENEFITS PROGRAM and CONCEPT ADMINISTRATORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 17, 1995

Washington, D.C. • THIEL PRESS • (202) 328-3288

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28 pp

QUESTIONS PRESENTED

1. Must the doctrine of contra proferentem be applied to overturn a plan administrator's interpretation of an employee benefit plan when the plan administrator did not abuse its discretion in making such interpretation?

2. Given Petitioner's evident disregard to whether the GIFT procedure is a Covered Charge under the plan and the Ninth Circuit Court of Appeals' holding that the Plan Administrator did not abuse its discretion, will she be entitled to benefits even if she prevails on the contra proferentem issue she has raised in this appeal?

PARTIES

Petitioner is Donna Cole Winters, an individual. Respondents are Costco Wholesale Group Benefits Program (the "Plan"), a group benefit plan, and Concept Administrators, Inc. ("CAI"), which merged into Core Source, Inc., a Delaware corporation, in December 1993. Concept Source, Inc., is Costco's third-party claims administrator.

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OPINIONS BELOW

In an unpublished decision, the United States District Court for the Western District of Washington granted summary judgment for Ms. Winters. *Winters v. Costco Wholesale Group Benefits Program & Concept Adm'rs. Inc.*, No. C92-581WD (June 24, 1993). Costco and Con-

cept appealed the decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit unanimously reversed the district court's ruling and remanded the case with instructions to enter judgment in favor of Costco. *Winters v. Costco Wholesale Corp.*, 49 F.3d 550 (9th Cir. 1995), *petition for cert. filed* (July 18, 1995). The Ninth Circuit denied Winters' request for rehearing, and her request for a rehearing *en banc* was rejected on April 19, 1995.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statute involved in this case is the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001 *et seq.*

STATEMENT OF THE CASE

This is an undistinguished dispute between Winters and the Costco Wholesale Group Benefits Plan. The dispute centers on whether the cost of Petitioner's elective medical infertility treatment should be borne by the Plan. The administration of the Plan is governed by the Employee Retirement Income Security Act of 1974 ("ERISA").

Before undergoing the treatment in question, Winters inquired whether the Plan would reimburse her for her costs related to a gamete intrafallopian transfer ("GIFT") procedure. The administrator of the Plan, the Costco Wholesale Group Benefits Plan Administration Committee (the "Plan Administrator"), informed Winters

the treatment would not be covered. Winters nevertheless underwent the treatment and then submitted a benefits claim to the Plan Administrator.

The Plan Administrator denied Winters' claim for benefits because (1) the elective treatment was not "medically necessary" as defined in the Plan and (2) the treatment was expressly excluded by the Plan. The Administrator's decision was predicated on a common Plan provision which granted the Plan Administrator broad discretionary authority to interpret and construe the benefits provisions of the Plan.

Winters subsequently brought this action against the Plan to recover benefits, contending that a court should apply certain insurance contract principles to the interpretation of self-funded employee benefit plans governed by ERISA. Winters also joined CAI, a third-party administrator of the Plan which acts as an agent of the Plan Administrator in processing Plan benefit claims.

Winters originally brought suit in February 1992, in the Superior Court of King County, Washington, alleging the denial of benefits was wrongful and a breach of contract under state law. On April 6, 1992, Respondents removed the case to the United States District Court for the Western District of Washington. After discovery, both Respondents and Winters moved for summary judgment. Respondents moved for dismissal of all claims. Winters narrowed her claim to reimbursement for expenses incurred for a GIFT medical procedure that was performed on December 17, 1990. The District Court awarded summary judgment in favor of Winters, ruling she was entitled to benefits under ERISA, but that her state law breach of contract action for the same benefits was preempted by ERISA.

The Ninth Circuit Court of Appeals reversed Winters' summary judgment. It held that a court should apply a stringent version of the abuse of discretion standard in reviewing an administrator's decision when the administrator has been granted discretionary authority under the plan. Under this standard, the court then found that the Plan Administrator had not abused its discretion in denying Winters' claim. The court also ruled that the insurance contract construction doctrine of contra proferentem does not apply to a case in which an administrator has been granted discretionary authority. In addition, for purposes of determining whether Winters could be entitled to relief under the decision of *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382 (9th Cir. 1994), the Court of Appeals found ". . . there is no evidence in the record upon which a reasonable trier of fact could find an objective, reasonable expectation of coverage on the part of Winters." *Winters*, 49 F.3d at 555.

Winters then filed her petition to this Court.

SUMMARY OF THE ARGUMENT

This fact-specific case provides no issue appropriate for the Court's exercise of its discretionary jurisdiction. The GIFT procedures, which Petitioner voluntarily elected to undergo, were not reasonably necessary for the diagnosis and treatment of any illness or injury as was required before benefits could be provided under the Plan. The procedures were generally excluded from Plan coverage and specifically excluded by the Plan's denial of coverage for invitro (literally in glass) fertilization.

In addition, to recover benefits Petitioner must show the GIFT procedure was a Covered Charge and the Plan Administrator abused its discretion in determining bene-

fit eligibility *and* the Ninth Circuit was wrong in refusing to apply the rule of contra proferentem to the facts of this case. Despite this, Petitioner only challenges the Appeals Court's refusal to apply the contra proferentem rule, leaving unchallenged the court's independent holding that the Plan Administrator did not abuse its discretion in denying benefits to Petitioner.

Finally, despite Petitioner's contrary agrument, there is no significant division among the Circuits on relevant issues which merits this Court's resolution.

REASONS FOR DENYING THE WRIT

I.

BACKGROUND: THE ABUSE OF DISCRETION ERISA STANDARD OF REVIEW WAS NOT VIOLATED BY THE DENIAL OF BENEFITS TO WINTERS, WHO IGNORED ADVICE THAT THE GIFT PROCEDURES WERE NOT COVERED BY THE PLAN.

This case turns on what standard of review should be used when examining an ERISA plan fiduciary's interpretation of a medical benefit plan. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court established the abuse of discretion standard of review under ERISA. This petition is now before this Court because Petitioner believes that the insurance policy construction doctrine rule of contra proferentem should apply in all ERISA cases.

The Plan Administrator is required to administer the Plan within the meaning of section 3(16)(A) of ERISA, 29 U.S.C. §1002(16)(A). Under section 404 of ERISA, 29 U.S.C. §1104, the Plan Administrator is obligated to administer the Plan in the best interest of all Plan participants and beneficiaries.

Benefits under the Plan are self-insured by Costco. CAI is responsible for processing claims for Plan benefits. CAI is not a fiduciary. Its decisions are subject to review by the Plan Administrator.

As required by section 503 of ERISA, 29 U.S.C. §1133, Article XIV of the Plan contains procedures by which Winters' claim for benefits was reviewed by the Plan Administrator. Section 14.9 of the Plan gives the Plan Administrator broad authority to interpret the Plan and make benefits determinations:

> [T]he Plan Administrator shall have full discretion and authority to interpret or construe all provisions of the Plan in making its determinations. . . . The Plan Administrator had [sic] the absolute discretion and authority to construe disputed or seemingly [sic] inconsistent provisions of the Plan and to make all decisions regarding eligibility and/or entitlement to coverage or benefits.

It is undisputed that Winters has been employed by Costco and is a participant in the Plan. She underwent various treatments for infertility from 1983 through 1990. The Plan paid for some of these procedures but not for others. On December 17, 1990, after she was twice notified that invitro fertilization procedures were excluded from Plan coverage, Winters underwent the GIFT procedure. This procedure involves retrieving eggs from the patient's ovaries and placing the eggs, along with sperm, in the patient's fallopian tube.

Winters then filed a claim for Plan benefits in connection with the 1990 GIFT procedure despite the fact that Section 6.19 of the Plan specifically excluded "in vitro fertilization." CAI denied Winters' claim on the ground that GIFT is a type of in vitro fertilization.

Pursuant to the broad grant of discretionary authority to interpret the language of the Plan, the Plan Administrator then determined that GIFT was not a "Covered Charge" under the Plan because it was not "medically necessary" and that GIFT was within the Plan's express exclusion of in vitro fertilization.

The district court ruled that the Plan Administrator abused its discretion in denying benefits to Winters. It reasoned that the term "in vitro fertilization" was not the same as GIFT.[1] Thus, it found that the Plan Administrator abused its discretion in relying on the in vitro exclusion to deny benefits. In an alternate ruling, based on *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), the district judge applied the doctrine of contra proferentem and construed the in vitro exclusion narrowly and against the drafter, Costco.

Respondents appealed both rulings to the Ninth Circuit Court of Appeals. As to the first ruling, the Ninth Circuit ruled that the district judge misapplied the abuse of discretion standard of review enunciated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and that the Plan Administrator had not abused its discretion. *Winters*, 49 F.3d at 553-54. The court separately ruled that the district judge had misinterpreted *Kunin*, and that the doctrine of contra proferentem does not apply

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[1] The district court defined "in vitro fertilization" as fertilization of eggs outside of the body in a laboratory dish and placement of fertilized eggs in the uterus of the patient. GIFT, on the other hand, involves retrieving eggs from the patient's ovaries and placing the eggs, along with sperm, in the patient's fallopian tube. The apparent distinction was the location in the body in which the egg and sperm are placed.

to self-insured ERISA covered plans that grant broad discretionary authority to the plan administrator to interpret the terms of the plan. *Id.* at 554.

II.

ANY RULING BY THIS COURT WILL NOT RESULT IN RELIEF FOR PETITIONER BECAUSE PETITIONER DOES NOT SEEK REVIEW OF THE RULING THAT THE PLAN ADMINISTRATOR DID NOT ABUSE ITS DISCRETION.

The Ninth Circuit made two independent rulings in this case, both in favor of Respondents: first, it applied a heightened standard of review to offset the Plan Administrator's conflict of interest, and nonetheless held the Plan Administrator did not abuse its discretion in denying benefits for Petitioner's GIFT procedure, *Winters*, 49 F.3d at 553-54, and, second, it held that the doctrine of contra proferentem does not apply to self-funded ERISA plans that grant discretionary authority to a Plan Administrator to interpret the plan. *Id.* Petitioner challenges *only* the second holding.[2] As more fully explained below, she does not challenge the ruling that the Plan Administrator did not abuse its discretion in denying benefits. Therefore, even if this Court were to rule in favor of Petitioner on the issue of contra preferentem, the Ninth Circuit's holding that the Plan Administrator did not

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[2] Petitioner does claim that "an administrator abuses its discretion by failing to interpret [Plan] ambiguities in favor of the insured." Petitioner's Brief at 11. However, as the opinion below indicates, the finding that the Plan Administrator did not abuse its discretion and the inapplicability of contra proferentem to the facts of this case are independent and unrelated concepts. It is not an abuse of discretion for a plan administrator to not apply contra proferentem. Contra proferentem is a tool adopted by the *courts* for application by the *courts.*

abuse its discretion is unchallenged and Winters would still not be entitled to recover benefits.[3]

The abuse of discretion standard applied by the Ninth Circuit in this case was based on this Court's seminal decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). *Bruch* requires a court to make a de novo determination of whether a claimant is entitled to benefits under an ERISA plan, unless the plan gives the administrator discretionary authority to interpret the plan. If such discretion is granted, a court is to give deference to the decision of the plan administrator and only overturn a denial of benefits if the administrator abused its discretion.[4] *Id.* at 11.

Since the Plan granted discretionary authority to the Plan Administrator, the Ninth Circuit analyzed its decision under the abuse of discretion standard as follows:

> In evaluating Winters' claim the Plan Administrator relied on a statement of a consulting physician that GIFT consists of surgical removal of eggs from the ovaries of the patient combining the eggs with sperm outside of the patient's body, or "in vitro," and

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[3] In order to recover benefits, Petitioner would also have to establish that application of contra proferentem to save GIFT from the reach of the invitro exclusion results in GIFT being a "Covered Charge." The Plan does not include any reproductive procedures in its covered charges provisions. *See Winters*, 49 F.3d at 553.

[4] Some courts have used the term "arbitrary and capricious" to describe this deferential standard of review. The Ninth Circuit Court of Appeals generally uses the term "abuse of discretion," but has noted that there is no practical distinction between the two terms. *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1471 n.2 (9th Cir. 1993), *amended* 94 C.D.O.S. 1577, *reprinted as amended*, 1993 U.S. App. LEXIS 36315 (9th Cir. 1994).

> then placement of the same into the patient's fallopian tube. The Plan Administrator also reviewed Winters' medical records from the University of Washington Medical Center which characterized her procedure as "in vitro." . . . Winters has vigorously maintained and the district court agreed that GIFT and in vitro fertilization are distinguishable. However, this does not necessarily demonstrate that the interpretion given to "in vitro fertilization" by Costco clearly conflicts with the plain language of the Plan. . . . *Based on the evidence in the administrative record*, Costco's interpretation was not unreasonable.

Winters, 49 F.3d at 553-54 (emphasis added; citations omitted).

The district court concluded from the record presented by the parties on cross motions for summary judgment that the Plan Administrator had not abused its discretion. It reasoned:

> "Our inquiry is not into whose interpretation of the plan documents is most persuasive, but whether the plan administrator's interpretation is unreasonable." . . . Based on the evidence in the administrative record, Costco's interpretation was not unreasonable. The Plan made clear that the Plan Administrator had the final determination of benefit decisions. The district court erred in second-guessing the exercise of discretion, because there was no abuse of that discretion. . . . [E]ven if Costco has an interest in broadly construing the in vitro exclusion, there are no indications that the conflict had an impact on the decision to deny benefits.

Id. at 554 (citations omitted).

Petitioner does not demonstrate that the Ninth Circuit erred in its assessment under the abuse of discretion

standard, nor does she otherwise challenge that court's finding that there was no abuse of discretion. Petitioner's motion for summary judgment was based on the record submitted to the district judge. It vigorously contended that GIFT and in vitro fertilization are different procedures. As to the abuse of discretion ruling, Petitioner only says that the Ninth Circuit "did not consider whether Costco's investigation to determine the meaning of 'in vitro' was arbitrary and capricious. . . ." Petitioner's Brief at 52-53. This is a mischaracterization of the Ninth Circuit's opinion. Since the Ninth Circuit ruled that the Plan Administrator's interpretation of "in vitro" was not an abuse of discretion separate and apart from any need to apply the rule of contra proferentem, Petitioner's stance can only be interpreted as an acquiescence in that ruling.

Petitioner originally had a personal stake in the outcome of this suit. However, Petitioner has chosen to limit her challenge to the Ninth Circuit's ruling on the issue of contra proferentem. Since the other independent ground for denying her claims stands unchallenged, Petitioner has eliminated her personal stake in the outcome of this suit. *See Rosetti v. Shalala*, 12 F.3d 1216, 1224 (3d Cir. 1993) (developments occurring during adjudication can eliminate a plaintiff's personal stake and render a case moot).

A similar analysis was applied in *Ashcroft v. Mattis*, 431 U.S. 171 (1977). In that case, a lawsuit was brought under 42 U.S.C. §1983 by the father of an individual who had been killed by police while attempting to escape arrest. The father sought both damages and a declaratory judgment that the state statutes authorizing the police action were unconstitutional. The district court denied relief on both actions after finding that the defendants

had acted in good faith. The plaintiff appealed only the ruling on the declaratory judgment, not the damages claim, and on remand amended his complaint to seek only a declaratory judgment that the state law was unconstitutional. The Eighth Circuit Court of Appeals agreed that the statute was unconstitutional. This Court ruled that the case did not represent a live case or controversy after the plaintiff dropped the damages claim under 1983. *Ashcroft,* 431 U.S. at 172. The finding that the police officers were not liable to the plaintiff was final and could not be raised again. The Court said, "here, the District Court was asked to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith. No 'present right' of appellee was at stake." *Id.; cf. Haislah v. Walton*, 748 F.2d 359 (6th Cir. 1984).

Petitioner asks this Court to answer the hypothetical question of whether Respondents could have been liable under a contra proferentem analysis apart from the defense that the Plan Administrator did not abuse its discretion when it denied Petitioner's claim for benefits. Obviously, Petitioner and others may file future claims for benefits under the Plan. Presumably, Petitioner prefers that the doctrine of contra proferentem apply in such *future* cases. However, as stated in *Ashcroft*, this is insufficient to show that there is a present, live controversy between the parties. *Ashcroft*, 431 U.S. at 172 n.2. A ruling on the applicability of contra proferentem to ERISA cases may be of academic interest, but it will not decide this case in Petitioner's favor.

III.

PETITIONER MUST SHOW THAT GIFT WAS A "COVERED CHARGE" TO PERFECT HER CLAIM FOR BENEFITS UNDER THE PLAN.

The Plan document states in Section 5.1 that benefits are only available if a Plan participant incurs a "Covered Charge." Covered Charges are generally identified in Article V of the Plan as expenses that are medically necessary for the treatment of an illness or an injury. Article V of the Plan does not identify in vitro fertilization, GIFT or any other reproductive technology as a covered charge.

In addition, the Plan identifies numerous medical procedures that are excluded from coverage, whether or not they might be Covered Charges. Section 4.1 of the Plan states that benefits are only paid if a medical expense is both a Covered Charge and is not excluded under the Plan.

Petitioner's claim was denied on the dual grounds that the GIFT procedure is a type of in vitro fertilization expressly excluded by the Plan *and* the GIFT procedure was not within the Plan's definition of Covered Charge. Petitioner's argument that GIFT is not the same as in vitro fertilization is only partially useful to her. Her argument does not address the fact that the GIFT procedure is not a Covered Charge.[5]

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[5] The Ninth Circuit found that it did not need to rule on whether the GIFT procedure was a Covered Charge because it found Petitioner's contra proferentem theory did not get her over the hurdle of the Plan's invitro exclusion. *Winters*, 49 F.3d at 554. The Court also noted that the Plan Administrator had informed Petitioner before she underwent the GIFT procedure that she would not receive benefits because GIFT is not medically necessary for treatment of an accidental injury or illness, as required under the Plan's covered charge provision. *Id.* at 555.

IV.

THE CIRCUIT COURTS OF APPEAL ARE NOT SUBSTANTIALLY DIVIDED ON THE DOCTRINE OF CONTRA PROFERENTEM.

In view of the above, and to the extent it remains relevant to this case, Petitioner attempts to characterize the current state of the doctrine of contra proferentem as a labyrinth that creates widespread confusion. This is not accurate. None of the authorities cited by Petitioner would have led to a different result had they been applied by the Ninth Circuit in this case. With only a few exceptions, the decisions cited by Petitioner involved a de novo review and are inapposite to this case. Most cases involving a deferential standard of review have not applied contra proferentem to evaluate the decision of a plan administrator. As distinguished *infra*, a few courts have used contra proferentem as a tool for an unrelated, limited purpose that does not apply here.

A. Courts Are Not Divided on Applying *Firestone v. Bruch* to Determine the Standard of Review in a Case Involving a Claim for Benefits.

Petitioner expresses concern that courts have been confused about how to adjudicate cases involving different types of ERISA benefit plans. She reasons that the different standards may apply if a plan is fully insured, if it is self-funded, if it grants discretionary authority to the administrator or if the administrator has a conflict of interest. She also contends the courts are confused about when to apply the doctrine of contra proferentem to an ERISA case. *See* Petitioner's Brief at 7-12. This elaborate analysis creates artificial categories of distinc-

tion and is misleading.[6] In reality, cases decided since *Firestone v. Bruch* routinely apply either a de novo review or abuse of discretion standard of review. A reading of the few post-*Bruch* cases that have discussed the contra proferentem doctrine demonstrates that the key issue in those cases has been the application of the de novo review or abuse of discretion standards. The contra proferentem doctrine is of less importance.

The reason that contra proferentem has not been a main feature in the decisional law is that *Firestone v. Bruch* based its holdings on concepts of trust law, not insurance or contract law. *Bruch*, 489 U.S. at 110-11. The Court noted that ERISA codified certain trust law principles and made those principles applicable to a wide range of fiduciaries. *Id.* at 110. A fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries; and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." ERISA §404(a), 29 U.S.C. §1104(a). Moreover, a plan participant who is denied benefits is entitled to a "full and fair review" of the claim by the appropriate named fiduciary of the plan. ERISA §503, 29 U.S.C. §1133. In other words, the relationship among a plan sponsor, the plan administrator and the plan participants is not arm's length. Accordingly, the rule of contra proferentem, which was established by state courts in the context of arm's length

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[6]Petitioner's elaboration of widely divergent applications of contra proferentem should be suspect by its own weight under the rule of *Ockham's Razor*, i.e., that the simplest of two or more competing theories is preferable.

transactions between parties of unequal bargaining power, has not been the centerpiece of ERISA litigation after *Bruch*.

Since all ERISA plans are subject to ERISA's standards, the *Bruch* Court stated that the standards of fiduciary review apply

> . . . regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion."

Bruch, 489 U.S. at 115 (quoting Restatement (Second) of Trusts). Thus, the *Bruch* decision itself belies the distinctions Petitioner has suggested in creating the appearance of confusion in the circuits.

B. The Circuits Are Essentially Consistent in Their Application of the Doctrine of Contra Proferentem.

Petitioner asserts that "[t]he circuits are irreconcilably split regarding whether and to what extent contra proferentem applies under ERISA." Petitioner's Brief at 11-12. This is inaccurate. On closer examination, her discussion creates the appearance of an "irreconcilable" split by slotting cases into artificial categories. As discussed above, the primary focus of the courts since *Firestone v. Bruch* has been to determine if the *de novo* or abuse of discretion standard applies to the review of a particular fiduciary or plan administrator decision. Viewed in this light, the distinctions between the circuits are not difficult to reconcile.

The contra proferentem authorities cited by Petitioner in support of her argument for de novo review are completely inapposite to this case. In those decisions, the court was obligated to decide the interpretation of the plan itself. Indeed, the primary authority cited in support of Petitioner's claim, *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990), involved a de novo review of a claim for benefits.

Moreover, as noted by the Ninth Circuit, *Kunin* only stands for the proposition that contra proferentem should be applied to those cases in which the instrument does not indicate how ambiguous terms will be interpreted. *Winters*, 49 F.3d at 554 (citing *Kunin*, 910 F.2d at 539).

> In contrast [to *Kunin*] the Plan here states that the Plan Administrator has "the absolute discretion and authority to construe disputed or seemingly inconsistent provisions of the Plan and to make all decisions regarding eligibility and/or entitlement to coverage or benefits." The Plan thus states how Plan terms are to be interpreted, and the general rule of contra proferentem does not apply.

Id. In other words, the Ninth Circuit has not limited or, as Petitioner suggests, misread *Kunin*. It recognizes that *Kunin* can only apply as a precedent when a de novo review would otherwise be appropriate. Read in this light, the Ninth Circuit's decision in *Winters* is not out of harmony with those courts that have adopted *Kunin*.

Most of the other authorities cited by Petitioner involve a de novo review.

Nearly all of the authorities cited by Petitioner relied on the Ninth Circuit's ruling in *Kunin*. Petitioner claims

that "[m]ost circuits generally follow *Kunin*, and thus agree that contra proferentem applies to ERISA insurance policies. . . ." Petitioner's Brief at 11. However, as noted above, the Ninth Circuit has explained that, under its decision in *Kunin*, contra proferentem should not be applied to interpret the term "in vitro fertilization" in this case because the Plan plainly grants discretionary authority to the Plan Administrator. *Winters*, 49 F.3d at 554.[7]

Petitioner asserts that the courts in *Hanson v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991), and *Springs Valley Bank & Trust Co. v. Carpenter*, 885 F. Supp. 1131 (S.D. Ind. 1992), applied contra proferentem to interpret a plan in an abuse of discretion review. Petitioner's Brief at 14. Petitioner mischaracterizes these cases. There the issue was how to resolve conflicts between plan documents and summary plan descriptions. The courts applied contra proferentem for the limited purpose of determining the make-up of the operative plan document. The court in *Springs Valley Bank & Trust* carefully explained that the doctrine could not be used to interpret ambiguous terms in the plan in a deferential review. Utilizing contra proferentem to interpret ambiguous or inconsistent terms "would violate the limits of judicial review because the plan [sic] has the discre-

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[7] The Eighth Circuit has held that contra proferentem is inconsistent with ERISA, even in a de novo review. *See, e.g., Brewer v. Lincoln Nat'l Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991); *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1048 (U.S. 1993); *Finley v. Special Agents Mut. Benefits Ass'n. Inc.*, 957 F.2d 617 (8th Cir. 1992). This alternate approach to a de novo case is inapplicable to the abuse of discretion standard applied by the Ninth Circuit in this case.

tion to interpret ambiguous or conflicting terms and courts may only overturn those interpretations if unreasonable." *Springs Valley Bank & Trust,* 885 F. Supp. at 1141, n.15.

The decision in *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249 (3d Cir. 1993), illustrates another type of limited use that courts make of contra proferentem. There the court had to determine whether the plan language granted sufficient discretion to the administrator to warrant the abuse of discretion standard of review. Citing *Kunin*, the Third Circuit court applied contra proferentem to the plan language and ruled that a de novo review was appropriate. In other words, the court said it would only apply the abuse of discretion standard if the plan unambiguously granted discretionary authority to the administrator. *Id.* at 1256-58.

In another example, Winters claims that *Chauvin v. Texas Instruments, Inc.*, No. 91-2445, 1992 U.S. Dist. LEXIS 13683 (E.D. La. Sept. 5, 1992), stands for the proposition that contra proferentem is inapplicable to an ERISA insurance plan. *See* Petitioners Brief at 57. In reality, the court could not determine whether the plan in question was an ERISA covered plan. Therefore, the court did not decide whether to apply contra proferentem.

Petitioner claims that the Seventh Circuit applied contra proferentem to a case involving discretionary review in the case of *Brewer v. Protexall, Inc.*, 50 F.3d 453 (7th Cir. 1995). Petitioner's Brief at 14. Again, Petitioner has mischaracterized a decision. In *Brewer*, the court expressly stated it did not decide whether the de novo or abuse of discretion standard applied. *Id.* at 456 n.2. It gave the determination of the administrator no deference. *Id.* at 458. The language cited by Peti-

tioner for its claim that the court applied a deferential standard of review was a footnote in which it referenced the decisions in *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302 (7th Cir. 1992), and *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990). Both *Phillips* and *Kunin* involved a de novo review, not a deferential one. Thus, *Brewer* is either inapposite, because the standard of review was de novo, or it is an unreliable reading of case law.

Blair v. Metropolitan Life Ins. Co., 974 F.2d 1219, 1222 (10th Cir. 1992), does not identify which standard of review it applied. The court ruled in the plaintiff's favor and said, "We do so without resort to the contra proferentem rule, and without resolving whether that rule should be applied to contracts governed by ERISA."

Generally, courts have not applied the doctrine of contra proferentem in cases involving the abuse of discretion review. *See, e.g., Winters v. Costco Wholesale Corp.*, 49 F.3d 550 (9th Cir. 1995); *Pagan v. NYNEX Pension Plan,* 52 F.3d 438 (2d Cir. 1995); *O'Neil v. Retirement Plan for Salaried Employees of RKO Gen.*, 37 F.3d 55 (2d Cir. 1994); *McDuffey v. Michigan Conference of Teamsters Welfare Fund,* 872 F. Supp. 402 (E.D. Mich. 1994).

A few cases have, on unusual facts not applicable here, applied some type of contra proferentem rule for certain limited purposes, even while purporting to apply a deferential review. For example, *Doe v. Group Hospitalization & Medical Servs.*, 3 F.3d 80 (4th Cir. 1993), involved a fully insured plan in which the insurer denied coverage of a very costly bone marrow transplant. The court

gave the insurer's denial of benefits little deference due to its significant conflict of interest and ruled that the principle of construing contract provisions against the drafter was "helpful as a tool" for making a reasonable decision of an ambiguous provision. *Id.* at 89.

The closest any circuit has come to applying some type of contra rule in an abuse of discretion review is the Eleventh Circuit. However, on close examination, even the decisions indicate that the doctrine is applied in a limited fashion. In *Florence Nightingale Nursing Serv. v. Blue Cross/Blue Shield*, 41 F.3d 1476, 1481 (11th Cir.) (citing *Lee v. Blue Cross/Blue Shield*, 10 F.3d 1547, 1550 (11th Cir. 1994)), *cert. denied*, 115 S.Ct. 2002 (U.S. 1995), the court held that contra proferentem should only be applied in cases in which the administrator has a conflict of interest, and then only if the administrator cannot show that its interpretation of a term was not tainted by self-interest. The court also required that a claimant have a reasonable interpretation of the disputed language in the plan. In short, *Florence Nightingale* does not require application of contra proferentem to resolve all interpretations of ambiguous plan language. It is applied only after the court has determined that there has been an abuse of discretion. In *Winters*, the court found that the Plan Administrator did not abuse its discretion. Petitioner has not challenged this ruling. Thus, the *Florence Nightingale* court's application of contra proferentem to offset a conflict of interest is inapplicable to the present case.

CONCLUSION

The petition before the Court should not be granted. Petitioner will not be entitled to benefits under the Plan even if she prevails on the issue she has presented. The doctrine of contra proferentem does not apply to this case and will not yield benefits to the Petitioner even if applied because the Plan Administrator did not abuse its discretion in denying coverage and the GIFT procedure was not a "Covered Charge."

Respectfully submitted,

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